85-1658

No. 85-1657

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF NEW YORK STATE CABLE TELEVISION ASSOCIATION, ET AL. AS AMICI CURIAE

JOSHUA NOAH KOENIG, Counsel of Record

Suite 401
150 State Street
Albany, New York 12207
(518) 463-6676

Attorney for
New York State Cable Television Association
Alaska Cable Television Association
Connecticut Cable Television Association
Florida Cable Television Association, Inc.
Hawaii Cable Television Association
Indiana Cable Television Association
Kansas CATV Association
Louisiana Cable Television Association
Maryland-Delaware Cable TV Association, Inc.
Oregon Cable Communications Association
Washington Cable Communications Association
West Virginia Cable Television Association
Wisconsin Cable Communications Association
Wyoming Cable Television Association

QUESTIONS PRESENTED

1. May Congress empower a federal administrative agency to determine, pursuant to reasonable statutory guidelines and subject to judicial review, the compensation to be paid to a regulated utility company for the use of surplus space on its utility poles by cable television service companies?

2. Does the Pole Attachment Act of 1978, 47 U.S.C. 224, violate the Fifth Amendment to the Constitution by effecting a taking of property without providing for a constitutionally adequate determination of just compensation to paid for such taking?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1657

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

BRIEF OF NEW YORK STATE CABLE TELEVISION ASSOCIATION, ET AL. AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The *amici curiae* are a group of trade associations representing cable television operators in their respective states. They include the following parties: the New York Cable Television Association, the Alaska Cable Television Association, the Connecticut Cable Television Association, the Florida Cable Television Association, Inc., the Hawaii Cable Television Association, the Indiana Cable Television Association, the Kansas CATV Association, the Louisiana Cable Television Association, the Maryland-Delaware Cable TV Association,

Inc. (representing cable television operators in those two states), the Oregon Cable Communications Association, the Washington Cable Communications Association, the West Virginia Cable Television Association, the Wisconsin Cable Communications Association, and the Wyoming Cable Television Association. Some of these associations are incorporated and some are unincorporated membership associations.

This appeal arises from a decision of the United States Court of Appeals for the Eleventh Circuit (*Florida Power Corp. v. FCC*, 772 F.2d 1537 (October 8, 1985)), invalidating the federal Pole Attachment Act, which empowered the Federal Communications Commission to the regulate the rates, terms and conditions of the attachment of cable television service wires and facilities to the poles of utility companies.[1]

Some of these *amici curiae* associations represent cable television operators in states which have not exercised state-level jurisdiction over the pole attachment rates charged by utilities (such as Florida, Indiana, Kansas, Louisiana, West Virginia, Wisconsin, and Wyoming), and therefore these cable operators are directly reliant upon the Federal Communications Commission ("FCC" or "Commission") under the federal Pole Attachment Act for protection from unreasonable pole attachment charges. Others of these associations represent cable television operators in states which have exercised such state jurisdiction (such as New York, Delaware, Alaska, Connecticut, Hawaii, Maryland, Oregon, and Washington), and where the cable operators must rely upon state administrative agencies for such protection; but even in these circumstances the subject cable television companies and their associations have a vital interest in the instant case because the respective state administrative agencies have directly followed or adopted the FCC's pole attachment rate standards, or have been very substantially and clearly influenced by said standards, and because a confirmation of the lower court's ruling would

[1] Pub. L. No. 95-234, § 6, 92 Stat. 33, 35-36 (codified as amended at 47 U.S.C. § 224 (West Supp. 1985)). The Commission was authorized to regulate pole attachment arrangments under the Act only where these services are not similarly regulated by any state authority. 47 U.S.C. § 224(c).

undoubtedly put in jeopardy the jurisdictional authority of state as well as federal pole attachment regulations.

Notwithstanding their differences, each of the associations comprising this group of *amici curiae* performs an active and important function in pursuing the interests of cable television operators in its state, and particularly with respect to the subject before the Court, the establishment of utility pole attachment charges. Each represents almost every cable television company and operating cable TV system in its state, and does so in a wide variety of formal and informal contexts. Cumulatively, they represent about one thousand cable television systems with about ten million cable television subscribers.

Each of these associations, on behalf of itself and the cable television companies, systems and subscribers it represents, has a vital interest in the outcome of this appeal. Should the decision of the court below be upheld, the rates charged by utility pole owners for attachment of cable television facilities will rise dramatically and unconscionably. In some states this will result directly from the removal of the FCC as an available forum for resolving any disputes arising with the utility pole owners in the exercise of their monopoly over pole attachments, and from the absence of any alternative forum at a state level. Even in those states which exercised authority in this area, attachment rates are likely to go up sharply because of their historic reliance on the FCC standards as guidelines, and because a confirmation of the Eleventh Circuit's ruling would unavoidably put into jeopardy the authority of state administrators to continue to do what the Congress may not authorize the FCC to do. Such substantial increases in pole attachment rates could prove extremely (perhaps critically) damaging to the continued provision of cable television services.

Because of the significantly lower number of cable TV subscribers per mile of cable wire, as compared to the number of utility customers on average, and because of the relatively small contribution of pole attachment charges to the total revenues of utilities, a given dollar increase in the charge for attachment per pole results in a very substantially higher impact on the costs to cable subscribers than to the potential cost

savings to utility rate payers. Moreover, pole attachment charges represent a relatively high proportion of cable television operating costs.[2] Thus, attachment fee increases may cripple the profitability of cable services, directly resulting in substantial service rate increases to subscribers and in limitations on the improvement of service offerings and the expansion of service territories. Fears of the malicious motives of telephone utilities, which have consistently approached cable television as a rival and competitive industry, helped convince the FCC and Congress that some reasonable restriction on attachment charges was necessary. Without some such protection the very continuation of many cable television systems may be threatened.

The holding of the court below threatens more than the reasonableness of utility pole attachment arrangements. By finding that the Pole Attachment Act constituted a taking requiring just compensation under the Fifth Amendment,[3] and that Congress may not empower an administrative agency such as the FCC to determine such just compensation under a reasonable standard, even with court review available,[4] the Eleventh Circuit put in danger a wide variety of existing administrative procedures and regulatory programs at the state and federal level. Included among these is the ability of states to provide reasonable mechanisms for assuring that cable television services can be made available to the tenants of premises owned by others, which was the very subject of this Court's decision in *Loretto v. Teleprompter,*[5] relied upon by the court below.[6] The *amici curiae* associations have a strong interest in the impact which the instant appeal may have on these other areas of regulatory authority, and particularly with the regulation of service to tenants addressed in *Loretto.* If this Court's ruling in *Loretto* can now be found to forbid any state

[2] *See* the *Jurisdictional Statement* of Group W Cable, Inc., National Cable Television Association, Inc., and Cox Cablevision Corporation, appellants in this appeal, at 4.

[3] 772 F.2d 1537, at 1544.

[4] Id. at 1546.

[5] *Loretto v. Teleprompter-Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

[6] 772 F.2d at 1544.

or federally legislated regulatory programs in this area, significant harm will be done to operations of cable TV companies and the hopes of tenant residents to obtain communications services on reasonable terms.

The *amici curiae* contend that the dire results described above are not required by the Constitution or the rulings of this Court, and that the decision below is in error. These *amici* will be vitally affected by the outcome of this case. They urge this Court to review and reverse the decision of the Eleventh Circuit.[7]

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* adopt the statement of the case provided in the *jurisdictional statement* of appellants Group W Cable, Inc., National Cable Television Association, Inc. and Cox Cablevision Corporation.

SUMMARY OF ARGUMENT

In finding that the Pole Attachment Act is in violation of the Fifth Amendment, the Eleventh Circuit has held what is not a taking to be a taking, and in doing so has undone both the supposed taking and any available control on the reasonableness of utility pole attachment charges. The court below found, wrongly and without any record or support, that in effect a new right of attachment had been granted by Congress and the FCC to cable television operators.[8] However, even though the court expressed no objection to this supposed exercise of Congressional police power, and even though the petitioner Florida Power did not argue the invalidity of such a taking, the court did not proceed to review the adequacy of the compensation which might be appropriate for such a taking under the Fifth Amendment (which was all that had been requested by petitioner), nor did it even stop at ruling that an alternative

[7] The *amici curiae* submit this Brief by consent of the parties to this appeal. Their statements of consent have been filed with the Clerk of the Court.

[8] 772 F.2d at 1543.

method for setting such compensation was required. Such a ruling is in no way required by the Constitution or the decisions of this Court and would in itself have constituted error. Rather, the court below simply struck down the subject statute entirely, thereby invalidating the very grant of right which it supposed had been created by Congress, along with any compensation questions which might have arisen from such a taking.[9]

If left unreversed, the decision below would completely obstruck the public interest goals of Congress in adopting the Act (to ensure some mechanism for reviewing the reasonableness of the rates charged for pole attachment), goals to which that court had no discernible objection. The result of that decision, unsupported in factual assumptions or legal principle, is that pole attachment charges will be left entirely unreviewable, even by the courts. If any taking had occurred, it would have arisen, supposedly, from the statute which the court below has now struck down. Thus, such a ghostly taking has been laid to rest and no coins need even be placed on the grave.

The lower court's determination was fundamentally flawed by its misunderstanding of what, if anything, had been "taken". In fact, Congress did not create some new right of pole attachment, a right to make, uninvited, a permanent physical occupation of the private property of the utility, or for a cable TV operator to unilaterally appropriate pole space or to convert some such property to its own ownership.[10] To the contrary, no

[9] Id. at 1546.

[10] "Moreover, the Commission's jurisdictional reach extends only to those entities which participate in the provision of communications space on utility poles. Thus, an electric power company which owns or controls a utility pole would be subject to FCC jurisdiction only if two preconditions are met: (1) the power company shares its pole with a telephone company, or other communications entity; and, (2) a cable television system shares the communications space on the pole with the telephone utility or other communications entity, or occupies the communications space alone. An electric power company owning or controlling a pole on which no communications space has been designated would not be subject to FCC jurisdiction. S. 1547, as reported, does not vest within a CATV system operator a right to access to a utility pole, nor does the bill, as reported, require a power company to dedicate a portion of its pole plant to communications use."
Senate Report 95-580 at 15-16 (Nov. 2, 1977) to accompany S. 1547 which became Pub.L. 95-234, 92 Stat. Vol. 2 108, 123-124.

taking was ever involved, at least not in the context of the Fifth Amendment. Rather, if anything was taken from the utilities, it was only their ability to *charge* an unreasonable, monopolistic price. Not one foot, nor even one inch, of any pole was removed from the ownership, usage or enjoyment of the utility company. If hypothetically, Congress had made such a taking, so that it could thereafter allow cable operators to rent such space directly from the government, then a Fifth Amendment question would likely arise. But, this did not happen. Neither Congress nor the FCC has mandated that any utility go into, or stay in, the business of sharing its surplus pole space. Nor has the Act even attempted to restrict the price charged for such arrangements to a level which could be argued to be in any sense confiscatory. The Act allows the pole owners to continue to reap the value of such pole space by charging reasonable rental rates.[11] In reality, this law creates nothing more than another form of rent control regulation.

If the Act effected a taking, then the court below should have considered whether that type of taking was inherently improper. But even that court did not find such a taking to be improper. In the *Loretto* decision, relied upon by the court below, this Court found that a taking had been effected, but it did not hold that the taking was in any way improper.[12] The

[11] The Act authorizes the FCC to regulate the rates, terms and conditions for pole attachments to provide that they are "*just and reasonable*", 47 U.S.C. § 224(b), (and only if no appropriate state-level regulatory mechanism exists, Id. § 224(c)). It states that, "a rate is just and reasonable if it assures a utility the recovery of not less than the additional cost of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usage space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way." Id. § 224(d)(1). Or, in effect, a rate that is at least equal to the "additional" or "avoidable" costs of the utility and no greater than the "fully allocated costs". Senate Report 95-580 at 19 (Nov. 2, 1977), 92 Stat. Vol. 2 108, 127.

[12] "The Court of Appeals determined that § 828 serves the legitimate public purpose of 'rapid development of and maximum penetration by means of communication which has important educational and community aspects,' 53 N.Y.2d, at 143-144, 423 N.E.2d at 329, and thus is within the State's police power. We have no reason to question that determination." *Loretto v. Teleprompter-Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982).

Court found only that just compensation must be paid for that taking, but it did not invalidate the state statute at issue. If, as appellants argue in the instant appeal, the taking effected by the Pole Attachment Act is merely a taking of the utility company's ability to charge unreasonable and monopolistic prices, then the propriety and validity of the Act is all the more evident.

If this form of regulation requires the setting of just compensation in a Fifth Amendment context, then the court below should have considered the proper amount of compensation which would have satisfied the Constitutional rights of the pole owners, as well as the proper forum for setting that amount. The precedents make clear that the Constitution is satisfied if a fair and reasonable price is allowed. This is precisely what Congress has directed. If this Court confirms that Congress and its properly authorized administrative agencies may not establish such reasonable rates by regulatory action, even subject to judicial review, then the courts themselves might have to act as case-by-case ratemakers in all instances of utility rate regulation or rent control programs. Such a conclusion is unreasonable on its face and inconsistent with a long line of clear precedent.

ARGUMENT

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Eleventh Circuit's decision is inconsistent with established law on the application of the Takings Clause and the setting of just compensation

I. *Loretto v. Teleprompter* Is Inapplicable.

The Eleventh Circuit's reliance on this Court's decision in *Loretto v. Teleprompter* is entirely misplaced. In *Loretto* a state statute had expressly prohibited landlords of tenanted properties from refusing to permit the installation of cable television service to their tenants.[13] There was no question that the

[13] N.Y. Exec. Law § 828 (McKinney 1982).

intrusion would be an unwilling one from the point of view of many landlords. The need for such a requirement had been clear to the State Legislature, which recognized that many landlords would see no reason to permit cable television installation upon any terms (and some landlords would have reason to forbid such services in order to further their own competitive services).[14] This Court found that such a statute effected a taking in the Fifth Amendment context, because it resulted in an unconsented permanent physical occupation of the landlord's property.[15]

By comparison, the federal Pole Attachment Act merely attempts to regulate the existing and future pole attachment rental prices charged by utility companies which are willingly in the business of sharing their surplus pole space.[16] This is no more than a classic form of proper business regulation; it is made even less controversial because the regulated businesses are already public utilities (with controlled or controllable rates of return), because the "properties" at issue are already dedicated to the protected utility rate bases, and because the underlying property value being regulated (the scarce pole space) was created by the government as a beneficial monopoly and therefore always was subject to regulation to prevent abuse of the monopoly.[17]

[14] These legislative considerations were noted by the New York Court of Appeals in its original decision upholding the validity of the statute in question. *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 140-141, 423 N.E.2d 320, 327-328 (1981).

[15] 458 U.S. 419, 438 (1982).

[16] See footnote 10, supra.

[17] Professor Epstein discusses the special situation faced by privileged utilities in his recent study of the Takings Clause. Although he is generally critical of the failure of modern decisions to provide just compensation, he supports the theory of regulation of utilities. He notes for example,

> "Direct rate regulation is therefore understood as the tail end of a system that confers upon the regulated industry the private power of eminent domain. In one sense it closely resembles the situation already considered with workers' compensation, where the size of the quid pro quo is left to legislative discretion, with little or no constitutional scrutiny by the courts." Epstein, *Takings: Private Property and the Power of Eminent Domain*, 275 (1985).

In adopting the Pole Attachment Act Congress expressed no concern that a right of attachment was even needed.[18] In clear distinction to the statute considered in *Loretto,* Congress intended here only to regulate, not to appropriate.

In writing for the majority in *Loretto,* Justice Marshall took care to distinguish that government regulation on the use of property is not necessarily a taking requiring just compensation in the Fifth Amendment context. Citing *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978), he wrote, "the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest." 458 U.S. 419, at 426. In *Loretto* this Court made clear that its holding was based on the circumstance of an unwilling permanent physical occupation. It expressly noted other instances in which even severe forms of government regulation, amounting to a complete prohibition of the affected commercial activity, were held not to be takings.[19]

The *Loretto* decision made particular reference to precedents upholding regulation of the landlord-tenant relationship, "without paying compensation for all economic injuries that such regulation entails"[20], citing among others decisions upholding rent control statutes (*Bowles v. Willingham,* 321 U.S. 503 (1944), and *Block v. Hirsh,* 256 U.S. 135 (1921)). These were distinguished from the *Loretto* facts because, "in none of these cases . . . did the government authorize the permanent occupation of the landlord's property by a third party."[21] In its summary the Court noted that its decision was "very narrow",

[18] "It has been made clear in testimony by CATV industry representatives to this committee that access to utility poles does not in itself constitute a problem, among other reasons because CATV offers an income-producing use of an otherwise unproductive and often surplus portion of plant." Senate Report 95-580 at 16 (Nov. 2, 1977), 92 Stat. Vol. 2 109, at 124.

[19] Citing at 458 U.S. 431, *U.S. v. Cent. Eureka Mining Co.,* 357 U.S. 155 (1958), in which certain gold mines were ordered to cease operations altogether, without compensation for lost revenues; and at note 10 at 433, and at 436, *Andrus v. Allard,* 444 U.S. 51 (1979), in which a complete ban on the commerce in eagle feathers was held not to be a taking.

[20] 458 U.S. 419, at 440.

[21] Id.

and reiterated that it did not, "question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property." (emphasis in original)[22]

In the instant case, the court below relied upon the *Loretto* decision because it found that the subject statute, the Pole Attachment Act, forced utility pole owners to allow cable television attachments.[23] This was simple error. Based on that false presumption, the court examined whether the supposed intrusion involved a "permanent physical occupation", with particular concern regarding whether the occupation was "permanent"; the court found that it was "permanent" in the context of the *Loretto* standard.[24] However, this issue of permanency has relevance only if the occupancy was forced and uninvited; a consentual attachment (even at rates which are regulated without consent) is almost by definition non-permanent.[25]

In fact, when understood to be merely another form of rent control legislation, the validity of the Pole Attachment Act is confirmed by the decision of this Court in *Loretto.* The court below rests its conclusion that the instant pole attachments are

[22] Id. at 441.

[23] 772 F.2d 1537, at 1543.

[24] Id. at 1544.

[25] Congress appears to have considered that the Act would permit FCC restriction of a utility's termination of attachment rights only in the most extreme and abusive circumstances.

> "While S. 1547, as reported, does not legislate a guarantee of access by CATV systems to utility poles, the committee recognizes that it is conceivable that a nontelephone utility which currently provides CATV pole attachment space might discontinue such provision simply in order to avoid FCC regulation. The committee believes that under S. 1547, as reported, the Commission could determine that such conduct would constitute an unjust or unreasonable practice and take appropriate action upon a finding that CATV pole attachment rights were discontinued solely to avoid jurisdiction."
>
> Senate Report 95-580 at 16 (Nov. 2, 1977), 92 Stat. Vol. 2 109, at 124.

unconsented upon too fine a distinction; it sees a lack of consent merely in the fact that the *price* of attachment was not agreeable to the utility.[26] This is hardly the type of unconsented physical intrusion addressed in the "very narrow" decision in *Loretto*.

It is also very important to consider what the *Loretto* decision did *not* hold. This Court did not find that the state statute at issue in *Loretto* was in any way an improper exercise of the State's police power.[27] It did not strike down the statute and invalidate the taking. It did not find that the amount of compensation sought by the appellant there (the current market, monopolistic, "hold-out", value of the landlord's agreement to permit entry) was the proper standard for satisfying just compensation under the Fifth Amendment.[28] And it did not hold that the State's mechanism for setting just compensation was inadequate or that such just compensation could only be set by the direct and first instance adjudication of the courts.[29] Clearly, the Eleventh Circuit's reliance on *Loretto* was inappropriate in this instance.

---

[26] "Assuming for the moment that Florida Power's actions can be construed as an invitation to access its poles, it is nonetheless clear that that invitation was made subject to and based upon certain conditions, namely the agreed upon annual per pole rate. . . . While they may have been invited at the outset, they certainly weren't invited at the rate imposed by the FCC. In our opinion, the cable companies' occupation of Florida Power's poles *at the rates specified by the FCC* is anything but invited." (Emphasis added) 772 F.2d 1537, at 1543.

[27] See footnote 12, supra.

[28] This Court took care to note that its ruling, "does not presuppose that the fee which many landlords had obtained from Teleprompter prior to the law's enactment is a proper measure of the value of the property taken. The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand." 458 U.S. 419, 441.

[29] Under the New York statute in question in *Loretto* the amount of compensation is set in the first instance by a state regulatory agency, the Commission on Cable Television, pursuant to standards it adopts by regulation. N.Y. Exec. L. § 828(1)(b) (McKinney 1982). On remand, the New York Court of Appeals reviewed the statute and found that it comported with Fifth Amendment requirements and that the setting of just compensation by the administrative agency in the first instance, subject to the judicial review

(footnote continues)

II. Congress may empower an administrative agency to determine just compensation for a Fifth Amendment taking, pursuant to reasonable standards, and subject to judicial review.

Even if, hypothetically, Congress had made a taking of utility pole space, and thus created a right of just compensation for the utility pole owners under the Fifth Amendment, nothing in the Constitution or the decisions of this Court would forbid Congress from establishing a mechanism for the determination of such just compensation in the first instance by an administrative agency, such as the FCC. Congress may also provide reasonable standards to be followed by such an agency in making its determinations of just compensation. The validity of such an arrangement is perfected by the availability of judicial review.

The determination of the Eleventh Circuit in the decision below that the setting of just compensation may only be done directly by the courts in the first instance [30] is in error and should be reversed.

The Eleventh Circuit's reliance on *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312 (1893), is both outdated and misplaced. That case addressed the *adequacy* of compensation in a Fifth Amendment context. This Court has made clear that it is inappropriate to cite that case for the conclusion that the courts are the exclusive appropriate forums for the determina-

---

(footnote continued)

already guaranteed under New York law, was appropriate and Constitutional. 58 N.Y.2d 143, 446 N.E.2d 428, 459 N.Y.S.2d 743 (1983). It discussed at length and expressly rejected the appellant's arguments that just compensation must be set in the first instance by the courts. "Neither the federal nor the state constitution proscribes determination of compensation for a taking by a commission rather than a court." Citing *Bauman v. Ross*, 167 U.S. 548, 593 (1897), and distinguishing and explaining *Matter of Keystone Assoc. v. Moerdler*, 19 N.Y.2d 78, 89 (1966) and *Matter of City of New York (Fifth Avenue Coach Lines)*, 18 N.Y.2d 212, 218 (1966), which confirmed only "that the Legislature may not itself fix compensation, not that it may not authorize the first instance determination of compensation by commissioners or a commission, subject to later judicial review." 58 N.Y.2d 143, at 152.

[30] 772 F.2d 1537, at 1546.

tion of just compensation. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 151 n.39 (1974).[31] The New York Court of Appeals in its decision on remand of *Loretto* addressed this specific issue in the context of that case, after acknowledging this Court's express ruling that the statute considered in that case effected a taking requiring just compensation,[32] and pointed out that the principle that such compensation could be set by a legislatively created commission was so well established that a provision of the New York Constitution which enunciated that point had been repealed in 1964 as "obsolete and superfluous".[33]

What *Monongahela Navigation* did establish was the simple principle that a legislative body may not effectively remove from the courts the ultimate residual authority to review any determination of just compensation for a Fifth Amendment taking to ensure that such compensation is adequate to satisfy Constitutional compliance.[34]

The establishment of reasonable Congressional standards to be used by an administrative agency in its determinations of just compensation does not alter the principle stated above. The judicial test still remains one of whether such standards allow the setting of just compensation as ultimately reviewed by the courts.[35]

---

[31] See also, *Munn v. Illinois*, 94 U.S. 113 (1877); *Bauman v. Ross*, 167 U.S. 548, 593 (1897); and other cases cited by the appellants in this case.

[32] See note 29, supra.

[33] 58 N.Y.2d 143, 152, referring to subdivision (b) of section 7 of article I of the New York Constitution (McKinney's Cons Laws of NY, Book 2, NY Const, Art I, § 7, Historical Note).

[34] "*Monongahela* did no more than restate the general principle that the courts, not the legislature, are ultimately entrusted with assuring compliance with constitutional commands." *Regional Rail Reorganization Act Cases*, 419 U.S. at 151 n.39.

[35] Although the recent Court of Claims decision relied upon by the court below, *Miller v. United States*, 620 F.2d 812 (1980), notes in passing that a just compensation determination, "is basically a question of fact" and as such exclusively a judicial function (citing *Monongahela Nav. Co. v. United States*), it immediately thereafter holds that, "the rate of interest set by a statute" [which was at issue therein] "can be applied to a claim for just compensation if such rate is reasonable and judicially acceptable." 620 F.2d at 837.

Even if no direct judicial appeal is provided (unlike here where the determinations of the FCC under the Pole Attachment Act are expressly appealable to the federal Courts of Appeals[36]) the availability of a claim under the Tucker Act[37] ensures that property owners will have some form of judicial review available to protect their rights to just compensation under the Fifth Amendment when a taking has been made by action of the federal government.[38] Where an appeal to judicial review is available, as here, no inherent violation of the Fifth Amendment is evident merely from a Congressionally created administrative mechanism for setting just compensation in the first instance.[39]

In the case of a Pole Attachment Act considered here, the availability of judicial review has been demonstrated by the very proceeding brought by the petitioner Florida Power in the Eleventh Circuit, and by similar prior appeals appropriately reviewed by the federal Courts of Appeals.[40]

III. Congress may regulate the activities of commercial enterprises without effecting a taking requiring the payment of just compensation under the Fifth Amendment.

The principle that legislative regulation of commerical activities or of the use of private property, in the proper exercise of the government's police power, is not a taking requiring the payment of just compensation under the Fifth Amendment is well established. In *Munn v. Illinois*, 94 U.S. 113 (1877), the Court confirmed the long-established principle that private property, otherwise protected from government control or removal, may become subject to regulation when the owner

---

[36] 47 U.S.C. § 402(a).

[37] 28 U.S.C. § 1491 (1982).

[38] *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S. Ct. 2862 (1984).

[39] *Bauman v. Ross*, supra.

[40] *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981), upholding the FCC's regulatory standards for pole attachments; *Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985), ordering certain modifications of the FCC's compensation calculations under the statutory standard; and *Texas Power & Light Co. v. FCC*, No. 84-4818 (5th Cir. March 17, 1986), in accord with *Alabama Power*.

willingly puts it to use in a manner subject to a public interest.[41] The owner's common law rights in his property can not prohibit a proper exercise of legislative power, and there (as here) this allowed for the regulation of rates for property usage by others, to allow the owner a reasonable rate but not one determined by the purely monopolistic market value controlled by the owner.[42] Since the decision in *Munn* this Court has repeatedly held various forms of regulation to be proper exercises of the police power and not violative of the Takings Clause.[43] The established test for review of the regulation of rates of a utility service is whether the limit on investment return is so severe as to be genuinely confiscatory.[44]

The Pole Attachment Act is simply another of the rate regulation programs which should be reviewed by this standard. The control imposed does not constitute an uninvited taking of property of the type addressed in *Loretto,* but only a restraint on the price charged for an otherwise invited relationship. As recently as last year the Court of Appeals for the District of Columbia considered the *Loretto* standard in detail before holding that a regulation of privately operated taxi stands in the city of Washington was not a taking because of the voluntary participation of local hotels in making such taxi stands available on their private property. *Hilton Washington Corp. v. District of Columbia,* 777 F.2d 47 (1985).

---

[41] "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public, for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." 94 U.S. at 126.

[42] Id. at 134.

[43] In the *Loretto* decision, relied upon the court below, this line of decision was described extensively. 458 U.S. 419, 426-441. See generally, *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

[44] *FPC v. Hope Natural Gas Co.,* 320 U.S. 591 (1944); *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968)

The Eleventh Circuit decision in the instant case seemed to show an unexpected concern with the preexisting contract rights of the utility pole owners. But it is well established that a preexisting contractual right may be limited or modified (or even eliminated) by proper exercise of the regulatory function of Congress. *Louisville & Nashville R.R. Co. v. Mottley,* 219 U.S. 467, 31 S.Ct. 265, 55 L.Ed. 297 (1911).[45]

Ultimately, what is at issue in this case is not the application of the Fifth Amendment, but the question of the proper amount of the compensation which the affected utilities may charge for their cooperative sharing of pole space. For if the amount permitted is a fair and reasonable one then questions about the application of the Fifth Amendment are effectively moot.[46] The proper determination of the value of the utility's rentable pole space is not based on the monopolistic "hold-up" price which might be obtained by the utility, but a reasonable return on the investment of the utility in the regulated property.[47] The proper measure of value is the owner's loss, if any, not the taker's gain.[48] In the instant case there is no loss because the Act has guaranteed a non-confiscatory recovery ("not less than the additional cost of providing pole attachments" [49]) and the FCC's standards have ensured that the maximum fair return on investment (fully allocated costs recovery, as permitted by the Act) is recovered.[50] To determine the value of the pole usage on the basis of the market price, as the Eleventh Circuit seemed inclined to do (with reference to the pre-Act contract prices extracted by Florida Power through its monopolistic dominance) would be to validate for the first time

---

[45] ". . . the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made." 219 U.S. at 485.

The *Louisville & Nashville* decision is cited by the D.C. Circuit in its ruling confirming the FCC's pole attachment regulations. *Monongahela Power Co.,* 655 F.2d 1254, 1256 (D.C. Cir. 1981) (per curiam).

[46] *Alabama Power Co. v. FCC,* 773 F.2d 362, 367 n8 (D.C. Cir. 1985).

[47] *FPC v. Hope Natural Gas Co.,* 320 U.S. 591 (1944).

[48] *Kimball Laundry Co. v. U.S.,* 338 U.S. 1, 5 (1949).

[49] 47 U.S.C. § 224 (d).

[50] *Alabama Power Co.,* supra., at 367 n8.

the "hold-up" price as a fair basis of rate regulation or just compensation. This artificial or inflated value based on the public need has been universally rejected as a measure of compensation.[51]

Because the Congress and the FCC have adequately provided for the ability of Florida Power to obtain a reasonable return on its shared pole space, no taking has occurrred and no danger arises that just compensation will not be paid even if a taking has occurred.

---

[51] *U.S. v. Cors*, 337 U.S. 325, 333-334 (1949); *McGovern v. New York*, 229 U.S. 363.

CONCLUSION

For the reasons expressed above, this Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

By _____
Joshua Noah Koenig

Suite 401
150 State Street
Albany, New York 12207
(518) 463-6676

Counsel for Amici Curiae Cable Television Associations

May 9, 1986